ABF Freight System, Inc. *and* Michael Manso and Andy Trujillo ABF Freight System, Inc. *and* Michael Manso. Cases 28–CA–9500 and 28–CA–9916

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 21, 1990, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Parties filed a brief in reply to the Respondent's exceptions, Charging Party Michael Manso filed cross-exceptions and a supporting brief, and the Respondent filed a brief answering the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

In Case 28–CA–9500 (Case 9500) of this consolidated proceeding, the judge found that in June 1988 the Respondent threatened six of its casual dockworkers with discharge if they refused to waive rights under the collective-bargaining agreement, and then discharged and subsequently refused to reinstate them because of their refusals, in violation of Section 8(a)(3) and (1) of the Act. In Case 28–CA–9916 (Case 9916), the judge found that in June 1989, following reinstatement of the dockworkers pursuant to a grievance/arbitration award, the Respondent violated Section 8(a)(4), (3), and (1) by discharging one of them, Michael Manso, because he had filed an unfair labor practice charge and had taken part in the dockworkers' contractual grievance. Manso was subsequently reinstated again pursuant to the grievance/arbitration procedure, and in August 1989 he was again discharged. The General Counsel alleged that this also violated Section 8(a)(4), (3), and (1). The judge, however, found that Manso was discharged for cause, i.e., dishonesty.

On our careful review of the record, we have determined that there is insufficient evidence to support the General Counsel's allegations and the judge's unfair labor practice conclusions in Case 9500 and, consequently, we dismiss that entire portion of the complaint. In Case 9916, we affirm the judge's finding that Manso was unlawfully discharged in June 1989, but we reverse the judge's dismissal concerning Manso's August 1989 discharge, concluding that it also was in violation of Section 8(a)(4), (3), and (1). The facts set forth below are drawn from the judge's relevant findings of fact, including his credibility resolutions, and from facts undisputed in the record. As we have indicated above, we affirm the judge's findings only to the extent they are consistent with this decision.

I. CASE 9500

A. *Facts*

The Respondent's dockworkers at its Albuquerque, New Mexico trucking terminal, both those on the regular seniority list and those employed on a casual basis, are covered by the Western States Area Agreement for local cartage workers and dockworkers, a supplement to the Teamsters' National Master Freight Agreement. Prior to spring 1988,[3] casual dockworkers under the supplemental agreement were afforded sharply limited rights; in particular, there were no seniority provisions covering casuals with respect to work calls and progression to regular dockworker status. Thus, the Respondent chose freely among the casuals to satisfy its fluctuating dock work requirements and, when a regular dockworker position opened up, the Respondent was not obligated to fill it from among the casuals. The new supplemental agreement concluded in April changed the employment practices concerning casuals. Article 60, section 4(e) (sec. 4(e)) of the supplemental agreement provided in relevant part:

> (e) Any casual . . . used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth (70) shift.
>
> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer.

[1] The Respondent's June 25, 1990 motion to strike Charging Party Manso's cross-exceptions and brief is denied as lacking in merit. The Board exercised appropriate discretion in response to the Charging Party's timely requests for extensions of time to file his papers. Further, assuming the truth of the Respondent's allegation that it did not receive notice of the April 26, 1990 extension request, it is clear that the Respondent did receive the Charging Party's May 18, 1990 request for an extension of time, and it has made no specific showing of prejudice by the Charging Party's failure to provide notice of its initial request.

The Respondent's July 16, 1990 supplemental motion to strike the Charging Party's cross-exceptions and brief, alleging their lack of compliance with the Board's Rules and Regulations, is also denied. Although not conforming exactly to the requirements of Sec. 102.46, the cross-exceptions and brief are not so deficient as to warrant striking.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates in this section of our decision are in 1988 unless otherwise noted.

> After such processing, if the casual employee meets the Employer's hiring standards and qualifications for regular employment, he/she shall be placed on a preferential hiring list for future regular employment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.
>
> Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.
>
> When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Thus, the new procedure applied preference by seniority as to casual work opportunities and regular employment for those casuals placed on the ''preferential hiring list.''

Soon after the new agreement was reached, a dispute developed between the Respondent's representatives at the Albuquerque terminal and representatives of Teamsters Local 492, bargaining agent for the Respondent's dockworkers, concerning the qualifications for placement on the preferential list pursuant to the terms of section 4(e). The Respondent interpreted the relevant provisions as establishing a time prerequisite—70 work shifts within 6 consecutive months—which, if satisfied, set in motion an ''automatic processing'' of the casual to determine if he met the Respondent's employment qualifications for a regular dockworker position. If the casual met those qualifications, he would be placed on the preferential list. If not, according to the Respondent's reading, the contract required that he be terminated. The Union interpreted section 4(e) to mean that all casuals meeting the time requirements alone must automatically be placed on the preferential list; once on the list, it would be the Respondent's obligation to train all of them to meet regular dockworker qualifications in preparation for future employment opportunities. Fueling this disagreement was the understanding of both the Respondent and the Union that most of the casual dockworkers were not qualified to drive tractor-trailer rigs—a requirement for regular dockworker employment with the Respondent for about 10 years. At some point prior to June 20, the Respondent offered the Union a compromise position for application of the contract language: the Respondent would place casuals on the preferred list if they satisfied the time requirements, but would be under no duty to train them in order to meet the requisite qualifications until a regular dockworker position became available. The Union did not accept this offer.

Under the new agreement, May 29 was the starting date for initial application of the ''automatic processing'' provisions of section 4(e). Accordingly, under the Respondent's interpretation, within 30 days from that date, all casuals meeting the time requirements had either to be placed on the preferential list, and thus considered qualified for regular employment, or be terminated. The Respondent's review of its personnel files established that 12 casuals met the time requirements and that none of them was driver qualified.

On June 20, the Respondent forwarded the following letter, signed by the terminal manager, to the 12 casuals:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in

> the aforementioned Article and your use as a casual is being discontinued effective immediately.

In addition, at about the same time, the Respondent's operations manager, Robert Herrington, had discussions with several of these casuals to explain their discharges. It is apparent from the record that these conversations followed the same basic pattern, the essential focus being the meaning of the June 20 discharge letters, the casuals' lack of driver qualifications, the Respondent's view of its contractual duties under section 4(e), and the Union's disputed interpretation. In some of these discussions, and within the context above, Herrington said, to one or another of the discharged casuals, that the Respondent did not want to let the casuals go, that it was concerned about the possibility of putting nondriver-qualified casuals on the preferential list, that the Respondent was not going to have a preferential list and this was the reason for the layoffs, that their terminations were the Union's fault, that the Union was not going to tell the Respondent whom it would hire, and that the Respondent did not want the preferential list and preferred the previous process for hiring regular dockworkers.

On June 21, the Union filed a contractual grievance on behalf of all the discharged casuals. The formal grievance procedure provided for a three-step process of hearings and review before joint panels of union and employer representatives. At about the time of the first step of the procedure, on June 29, Herrington offered the discharged employees reinstatement if they would agree to the waiver procedure set forth in the second paragraph of section 4(e). In the Respondent's interpretation, although the waiver of automatic processing was a waiver of the right to be considered for placement on the preferential list, it was also an alternative to the harsh edge of section 4(e)—discharge if the ''processed'' casual dockworker did not meet regular employment qualifications. Eventually, 5 of the 12 casuals, with the apparent concurrence of the Union, agreed to the contractual waivers and returned to work.[4] In addition, the Respondent determined on a further review of one casual's personnel record that he was in fact driver qualified as a result of previous employment, and it placed him on its regular dockworker seniority list. The remaining six—the alleged discriminatees in this case—did not agree to the waivers.

The first-step grievance panel deadlocked on the dispute. Soon thereafter, the Respondent renewed its compromise offer: immediate placement of all time-qualified casuals on the preferential list, but no driver training obligation until a regular dockworker position became available. The Union again was unwilling to accept this. The second-step grievance panel also deadlocked on the contractual question. On April 6, 1989, the third-step panel resolved the dispute by nullifying the contractual waivers that five of the grievants had signed, denying all monetary claims, and adopting, in essence, the Respondent's previous compromise offer.[5] Accordingly, the Respondent, inter alia, offered reinstatement to the alleged discriminatees and placement on the preferential list effective April 24, 1989, and an opportunity for qualifying driver training when regular dockworker openings occurred.

B. *Discussion*

Case 9500's complaint alleges that the Respondent violated Section 8(a)(1) by Herrington's statements to casual employees on June 20 that they were being discharged without regard to the terms of the collective-bargaining agreement and that the Respondent would not allow the Union to dictate whom the Respondent would hire. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) on June 20 by discharging the six alleged discriminatees in order to prevent them from exercising their contractual rights to be placed on the preferential list. Finally, the complaint alleges that, about June 29, the Respondent violated Section 8(a)(3) and (1) by demanding that the six casuals sign waivers of their contractual rights as a condition of reinstatement, and by refusing to reinstate them until April 1989 because they declined to sign the proffered waivers.[6]

The judge, in conclusions at variance with the complaint allegations and his own factual findings, deter-

[4] The Respondent's waiver offer was belated in the circumstances, as sec. 4(e) indicates that it should be offered prior to automatic processing. Although the record offers no explanation for this, it is established, in any event, that the Union agreed to the late offer.

[5] We affirm the judge's conclusion that deferral to the award of April 6, 1989, is inappropriate in Case 9500, but we find it necessary to rely only on the ground that there was inadequate consideration of the unfair labor practice issues pursuant to *Olin Corp.*, 268 NLRB 573 (1984). The record establishes that no evidence pertinent to the 8(a)(1) and (3) allegations, e.g., Herrington's alleged unlawful statements to the casuals, was placed in the record of the contractual proceeding, and thus the panel which determined the award was presented only with contractual issues and not with facts relevant to resolving the alleged unfair labor practices. See, e.g., *M & G Convoy*, 287 NLRB 1140, 1145 (1988); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988). For the same reasons, we find no merit in the Respondent's motion for reconsideration of the Board's denial of the Respondent's prehearing summary judgment motion seeking deferral to the award.

Regarding our colleague's concurring opinion, we find it noteworthy that Case 9500's complaint allegations charged unlawful discrimination under Sec. 8(a)(3) and unlawful interference with protected rights under Sec. 8(a)(1). Although our final disposition of these issues is premised on the finding that the Respondent acted solely on the basis of a reasonable and arguably correct interpretation of the relevant contractual provision, the pivotal 8(a)(3) and (1) issues in the complaint involved whether the Respondent's conduct was otherwise unlawfully or discriminatorily motivated. This question of motive, independent of any contract interpretation question, is most starkly revealed in the 8(a)(1) allegation that Respondent's Herrington told employees they were being discharged *without regard to the terms of the collective-bargaining agreement*, an allegation which directly affected the 8(a)(3) issue. In view of this, and the absence of any indication that the arbitration panel was presented with any factual issues raised by the complaint allegations, we find no basis for concluding that there was adequate arbitral consideration of the statutory issues before us.

[6] No 8(a)(5) allegation was made in the complaint, and the Union is not a party to this proceeding.

mined that on June 20 Herrington told the alleged discriminatees that they were being discharged because they had refused to sign waivers of their contractual rights to be placed on the preferential list, thus violating Section 8(a)(1), and that they were in fact discharged in violation of Section 8(a)(3) and (1) because they refused to sign such waivers.[7] The judge further found that on June 29 and thereafter, the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the casuals unless they signed waivers.

With respect to the judge's 8(a)(1) finding, it is clear from the record that on or about June 20 neither Herrington nor any other agent of the Respondent told the casuals that they were being discharged for refusing to sign waivers of their contractual rights. The matter of waivers, discussed below, did not arise until June 29. Further, there is no other evidence concerning Herrington's discussions with the casuals on June 20 that establishes an 8(a)(1) violation, as alleged in the complaint or otherwise. The context for his various statements was the dispute between the Respondent and the Union over the meaning of section 4(e), i.e., he was explaining the termination letters received by the casuals in light of the Respondent's view of its obligations under section 4(e)—a tenable view, as noted below—and he was also rejecting the Union's contrary position. In these circumstances, Herrington's statement that the reason for the terminations was that the Respondent was not going to have a preferential list was as likely a reference to the fact that none of the time-eligible casuals was driver qualified—thus providing no basis for a list—as it was an arguable interference with employees' statutory rights. His statements critical of the Union—that the Union would not dictate hiring decisions to the Respondent, that the discharges were the Union's fault—and his expression of dislike for the preferential hiring procedure, may be reasonably taken as a response to the Union's opposing interpretation of section 4(e) and the ramifications of the Union's position, which, in the Respondent's view, amounted to a contractually unwarranted interference in its training and hiring decisions with respect to jobs that entailed driving tractor-trailer rigs. Any possible inference that the hostility expressed by Herrington was attributable to animus against employees for exercising statutory rights is outweighed by Herrington's statements regarding the Respondent's reluctance to let the casuals go, the concern the Respondent felt at the prospect of putting employees not qualified to drive on a preferred list for regular dockworker employment, and the Respondent's obligation to comply with the contract as it interpreted it. Accordingly, there is sufficient ambiguity in Herrington's statements for us to conclude that the evidence does not establish a violation of Section 8(a)(1).

Further, regarding the specific complaint allegation that the Respondent discharged the casuals in order to prevent them from asserting contractual rights concerning the preferential list, the General Counsel made no evidentiary showing, and after the hearing did not contend before the judge, that this was the Respondent's motive in discharging the casuals.[8] More generally, there is on this record a noticeable absence of any protected activity on the casual dockworkers' part that would provide a conceivable basis for finding that the Respondent unlawfully terminated them on June 20. As of that date, none had invoked any perceived right under section 4(e) or other parts of the collective-bargaining agreement, nor had any declined to sign the waiver provided for in section 4(e). Further, there is no other evidence that they had exercised rights protected under the Act. More significant, with respect to the Respondent's motive, the evidence points plainly to the fact that the Respondent's conduct was driven by its understanding of section 4(e). We find that the Respondent's perception of this contract language—specifically the obligation to discharge time-qualified casual dockworkers who did not meet the qualifications and standards for regular dockworker employment—is a nondiscriminatory, reasonable, and arguably correct interpretation of the agreement. See, e.g., *Texaco, Inc*., 285 NLRB 241, 246 (1987); see also *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981). Accordingly, the 8(a)(3) and (1) allegations concerning the Respondent's discharge of the alleged discriminatees are without merit.

By June 29, the alleged discriminatees were engaged in protected concerted activity—participation in a grievance addressing both their discharges and an appropriate rendition of their contractual rights concerning the preferential list. See, e.g., *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). At that time, Herrington offered to reinstate them to their previous casual employee status if they would agree to the waiver procedure set forth in the second paragraph of section 4(e).

Although there are situations in which an employer may be found to have engaged in unlawful retaliation against an employee because of his exercise of contractual rights, such is not the case here. As in the case of the alleged discriminatory conduct on June 20, we find no evidence here that the Respondent's conduct in offering the contractual waiver procedure to the casuals was unlawfully motivated, i.e., a matter of retaliation for the employees' engaging in protected activity. Rather, it is apparent that the Respondent was motivated by its interpretation of section 4(e)—specifically, the provision of an alternative procedure that would

[7] In his posthearing brief, the General Counsel, abandoning the specific 8(a)(3) and (1) complaint allegations, urged this unlawful waiver theory concerning the Respondent's June 20 conduct.

[8] See fn. 7, supra.

exempt casual employees from the discharge mechanism in section 4(e), and thus allow for their reinstatement. Implicit in this view was that failure to opt for the waiver alternative required that their terminations pursuant to section 4(e) remain in effect. We find that the Respondent's waiver offer as a method for the discharged casuals to return to their jobs was based on a nondiscriminatory, reasonable, and arguably correct interpretation of section 4(e). See, e.g., *Texaco*, supra. With this motivation established, we conclude that the Respondent's waiver offer and its refusal to reinstate the casuals in the absence of a signed waiver did not violate the Act.

For the foregoing reasons, the unfair labor practice allegations of Case 9500 are dismissed.

II. CASE 9916

Alleged discriminatee Michael Manso and another discharged casual dockworker filed an unfair labor practice charge on November 21, 1988, concerning the terminations in Case 9500; they amended the charge twice, on November 28 and December 8, 1988. Manso also participated with the other discharged casuals in the contractual grievance concerning their discharges and their rights under section 4(e). As set forth above, following resolution of that grievance, Manso and other discharged casuals were offered placement on the preferential list effective April 24, 1989.[9]

Soon thereafter, Manso returned to work, now a ''preferential casual dockworker.''[10] As more fully detailed in the judge's decision, not long after his return, three of the Respondent's supervisory officials made statements to Manso indicating that the Respondent was seeking to retaliate against him because of his protected activity. On June 19, less than 2 months after his return, Manso was discharged, ostensibly for a second failure to respond to a work call—grounds for discharge under a newly instituted disciplinary policy for preferential casuals. He was subsequently reinstated without backpay pursuant to the contractual grievance procedure. We affirm the judge's findings and conclusions, fully set forth in his decision, that the supervisors' threatening statements and the Respondent's June 19 discharge of Manso violated Section 8(a)(4), (3), and (1).[11]

On August 11, Manso was 4 minutes late for work, and he received a disciplinary warning letter. This was the first time Manso had been late for work. On August 17, Manso was again late for work, this time by almost an hour. As more fully set forth by the judge, he told management officials, in essence, that his car had broken down on the highway, and in the ensuing scramble to get to work, he was stopped by the police for speeding. The Respondent checked his story and ascertained that it was largely a fabrication. By letter dated August 21, Manso was discharged on grounds of tardiness.

Operations Manager Ed Fultz, who signed the discharge letter, made clear in his testimony that Manso was not discharged because of his dishonesty; his lie established only that he did not have a legitimate excuse for the August 17 lateness. Fultz testified that he was discharged under a newly instituted tardiness policy for preferential casual dockworkers: two incidents of lateness result in discharge.

With respect to the Respondent's disciplinary policies and procedures in general, the Respondent's corporate vice president for industrial relations, Howard Johnson, whose responsibility encompassed employee disciplinary policies, testified that no disciplinary rules were ever posted for employees and that there was no uniform disciplinary policy covering dockworkers. More specifically concerning the Albuquerque terminal, Fultz testified that the lateness policy developed for preferential casuals did not apply to regular dockworkers or to nonpreferential casual dockworkers.[12] He also stated that a preferential casual's tardiness had no more or different effect on the operation of the terminal than that of other dockworkers.

According to Fultz, when Manso was late on August 11, it was the first time a preferential casual—a classification that had been in existence only a few months—had been tardy, and there was no specific lateness policy for preferential casuals at that time. In fact, when Manso inquired concerning the consequences for further tardiness, Fultz told him that although he should expect the worst, a policy had not yet been determined. Then, after consultation with the terminal manager and the corporate labor relations department, it was decided that preferential casuals would be discharged if they incurred two latenesses; thus, there would be a warning letter after the first tardiness, and discharge after the second, pursuant to the minimum disciplinary procedures under the collective-

[9] All dates in this section of the decision are in 1989 unless otherwise noted.

[10] At this point the Respondent had three dockworker classifications: those on the regular seniority list, nonpreferential casuals, and preferential casuals.

[11] In affirming this unlawful discharge, we rely particularly on the threatening statements made to Manso and the refusal of the Respondent's supervisor on June 19 to allow the ''verifying'' employee to redial Manso's telephone number, thereby bringing about Manso's second ''failure'' to respond to a work call, the purported grounds for his discharge.

We find it unnecessary to rely on the judge's apparent finding that the nature of the Respondent's work call policy contributed to the unlawfulness of Manso's discharge on June 19. To the extent that the judge appeared to find the call policy and related disciplinary matters discriminatory against the preferential casual dockworkers as a class, we note the absence of any pertinent complaint allegations and accordingly we decline to pass on the issue. See our further discussion of the Respondent's disciplinary policies concerning the preferential casuals below.

[12] Testimony and exhibits support the fact that other dockworkers were subject to a less stringent lateness policy, i.e., multiple latenesses resulted in warning letters and then suspensions, at worst, not discharge.

We find no merit in the Respondent's exception to the judge's admission of these exhibits. The judge correctly overruled the Respondent's objection at the hearing, finding that the documents at issue were relevant to the alleged unlawful discharges of Manso.

bargaining agreement. This reflected, according to Fultz, a strict disciplinary attitude toward preferential casuals as a general theme, because they constituted a new job classification. This policy was decided when the preferential list was established in April.

Fultz further testified that the new lateness policy corresponded with a distinct disciplinary policy that the Respondent had established previously for preferential casuals concerning failure to respond to work calls. In that matter, the Respondent had decided not long after the preferential list was effected that the first failure to respond to a work call would draw a warning letter and the second would result in discharge. Fultz noted that the earlier policy was implemented only after the preferential casuals were given written notification of the Respondent's workshift starting times, thus making clear when the preferential casuals must be available. The record otherwise establishes that, following its implementation, several preferential casuals were discharged under the ''two-call'' policy.

The judge concluded that because of Manso's dishonesty concerning his explanation for being late on August 17, the Respondent had discharged him for cause and not in violation of the Act. This is a plainly erroneous factual statement of the Respondent's asserted reasons and we reverse it. Fultz's testimony establishes that Manso's false explanation meant that his August 17 tardiness was not an excusable tardiness, and so he was charged with a second lateness—sufficient, in the Respondent's view, for termination. The Respondent provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action.[13] Cf., e.g., *Vilter Mfg. Corp*., 271 NLRB 1544, 1546–1547 (1984), in which the employer established that an employee's dishonesty was a basis under its policies for refusing reinstatement regardless of the employee's protected activities.

In the circumstances of this case, the unlawful statements by the Respondent's supervisors threatening retaliation when Manso first returned to work as a preferential casual and his unlawful discharge on June 19 provide strong evidence of the Respondent's unlawful motivation regarding Manso's August 21 discharge. Thus, just 2 months after his unlawful discharge for grievance activity and filing an unfair labor practice charge, the dischargee, having been reinstated through the grievance procedure, is again discharged, assertedly pursuant to a lateness policy which has just been instituted and of which Manso is the first violator. Further, the evidence shows that the Respondent's dockworkers who are not on the preferential list and who, it is reasonable to infer, perform work similar to that done by preferential casuals, are treated less strictly concerning tardiness than was Manso, in a work situation where the lateness of a preferential casual has no more impact on the operation of the Respondent's facility than that of the other dockworkers. In view of the above, we find that the General Counsel has provided a sufficient prima facie showing of an unlawful discriminatory discharge under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981).

The Respondent's burden, in the face of this prima facie case, was to show that it would have taken the same action against Manso even if he had not been engaged in activities protected by the Act. The essence of its asserted defense is that Manso was treated evenhandedly and nondiscriminatorily, pursuant to a disciplinary framework that had previously been developed for the preferential casuals. According to Fultz, a general decision was made at the time the preferential list was put into effect to apply strict disciplinary measures with respect to the preferential casuals, pursuant to no more than the minimum safeguards in the collective-bargaining agreement, because it was a new job classification. A work-call policy was implemented pursuant to this view: preferential casuals were issued warning letters the first time and discharged the second time they failed to respond to a call. The Respondent asserts that the lateness policy for preferential casuals initiated in response to Manso's tardiness, was no more than a routine decision within a disciplinary form already established. When Manso was discharged for a second lateness, according to the Respondent, he was treated similarly to other preferential casuals discharged for a second failure-to-respond under the work-call policy, and not differently than any other preferential casual would have been treated for a second lateness.

The Respondent's disciplinary approach toward the preferential casuals—strict discipline simply because they constituted a new classification—and its lack of uniform disciplinary policies and published rules applicable to all dockworkers raise more questions than they resolve in the context of a defense to an alleged discriminatory discharge. However, we have found it unnecessary to pass on the lawfulness of the Respondent's work-call policy and related disciplinary matters as they affected the class of preferential casuals, see footnote 11, supra. In any event, assuming, without finding, the nondiscriminatory character of the Respondent's general disciplinary view and the work-call policy for preferential casuals, and further assuming arguendo the consequent legitimacy of the lateness policy in itself, it is apparent that the Respondent's treatment of Manso under the lateness policy was not consistent with its previous conduct within the discipli-

[13] We, of course, do not suggest that giving dishonest excuses for lateness cannot be a legitimate ground for discharge or other disciplinary action. We are simply seeking to determine whether the Respondent *did* discharge Manso for this reason and would have done so even if he had not filed unfair labor practice charges and grievances.

nary framework for preferential casuals. Fultz testified that preferential casuals accumulated failure-to-respond incidents only after the work-call policy was implemented; a prior failure-to-respond was not held against them. Thus, this policy was applied prospectively, not retroactively. Fultz testified that the lateness policy was not determined until after Manso's August 11 tardiness. He was subsequently discharged because of the August 11 and 17 lateness incidents. However, only the one on August 17 occurred after the policy was instituted. In Manso's situation, the lateness policy was applied retroactively to include the August 11 lateness, distinct from the Respondent's application of the work-call policy. Accordingly, even assuming the validity of its disciplinary treatment of preferential casuals in general, the Respondent has not established that Manso was treated the same way that other preferential casuals would have been treated in similar circumstances.

We conclude that the Respondent has failed to rebut the General Counsel's prima facie case, i.e., that Manso's discharge was unlawfully motivated. Taking account of the General Counsel's case, it is apparent, and we find, that Manso's tardiness on August 17 was seized upon by the Respondent as a pretext to discharge him again and for the same unlawful reasons it discharged him on June 19. Manso's August 21 discharge violated Section 8(a)(4), (3), and (1), and we will issue an order accordingly.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4), (3), and (1) of the Act, we shall order it to cease and desist and to post an appropriate notice.

With respect to affirmative relief, we shall order that the Respondent make Michael Manso whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on June 19, 1989, from that date until the date of his subsequent reinstatement. We shall further order the Respondent to offer Manso full and immediate reinstatement to his job as a preferential casual dockworker and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge on August 21, 1989. Interest will be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

ORDER

The National Labor Relations Board orders that the Respondent, ABF Freight System, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they have filed charges under the Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

(b) Discharging employees or otherwise discriminating against them because they have filed charges under the Act, or because they have engaged in union or other protected, concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Manso immediate and full reinstatement to his former job or, it that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered due to the discrimination against him, in the manner set forth in the amended remedy section of this Decision.

(b) Remove from its files any reference to Michael Manso's unlawful discharges and notify him in writing that this has been done and that the discharges will not be used against him in any way.

(c) Preserve and, on request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay dues under the terms of this Order.

(d) Post at its Albuquerque, New Mexico facility copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, concurring.

I agree with my colleagues' decision in all respects except that in Case 28–CA–9500 I would defer to the arbitration award under the standards set forth in *Olin Corp.*, 268 NLRB 573 (1984).

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

There is no dispute that the arbitration proceeding was fair and regular, and all parties had agreed to be bound. The next question is whether the arbitration panel adequately considered the unfair labor practice issue. The Board will find that the arbitrator adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin*, supra, 268 NLRB at 574.

I recognize that the precise 8(a)(1) and (3) allegations of the complaint were not presented to the arbitration panel, but I find that the contractual issue resolved by the panel was factually parallel to the unfair labor practice issue. The contractual issue, as phrased by the Union, was whether the Respondent's treatment of the casuals violated section 4(e) of the contract. The unfair labor practice issue, as phrased by the majority, is whether the Respondent's conduct was based on a reasonable and arguably correct interpretation of section 4(e). Central to both issues is the meaning of the contractual provision. In the course of resolving the contractual issue, the arbitration panel did not entirely agree with the position of the Union or the Respondent, but adopted a middle view that incorporated elements of the positions of both parties. Therefore, I believe that implicit in the award is a determination that both parties' positions were reasonable. Thus, I would find that the arbitration panel decided the contractual issue in such a way as to effectively resolve the unfair labor practice issue.

As to whether the parties generally presented the arbitration panel with facts relevant to the statutory issue, the record shows that the panel received ample evidence. That certain evidence (i.e., Operations Manager Herrington's statements to the casuals) was not presented to the panel does not defeat a finding that the panel was generally presented with the facts relevant to the statutory issue. See my concurring opinion in *Haddon Craftsmen*, 300 NLRB 789 (1990).

Finally, contrary to the General Counsel's contention, I would find that the award is not clearly repugnant to the Act. In this connection, I note that the panel's failure to award backpay does not, standing alone, render the award clearly repugnant. See, e.g., *Crown Zellerbach Corp.*, 215 NLRB 385, 387 (1974).

In sum, the General Counsel has failed to show any defects in the arbitration award that warrant failure to defer. On this basis, I join my colleagues in dismissing the unfair labor practice allegations in Case 28–CA–9500.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge because they have filed charges under the National Labor Relations Act or because they have filed grievances under the provisions of a collective-bargaining agreement.

WE WILL NOT discharge employees or otherwise discriminate against them because they have filed charges under the National Labor Relations Act or because they have engaged in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Manso immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his unlawful discharges, with interest.

WE WILL notify him that we have removed from our files any reference to his unlawful discharges and that the discharges will not be used against him in any way.

ABF FREIGHT SYSTEM, INC.

Lewis S. Harris, Esq., for the General Counsel.
John V. Jansonius, Esq., of Dallas, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on two unfair labor practice complaints,[1] issued by the Regional Director or the Acting Regional Director for Region 28 and consolidated for hearing, which allege that Respondent ABF Freight System, Inc.,[2] violated Section 8(a)(1), (3), and (4) of the Act. More particularly, the two complaints allege that the Respondent threatened casual dockworkers employed at its Abuquerque terminal with discharge in violation of an outstanding collective-bargaining agreement and then discharged six casual employees on or about June 20, 1988, because they refused to sign waivers of their rights under the existing collective-bargaining agreement. The complaints also allege that, after these individuals were reinstated to their former positions, discriminatee Michael Manso, one of the previously discharged casuals, was threatened by several supervisors that the Respondent would retaliate against him for filing a grievance and for filing an unfair labor practice charge. The complaints also allege that, on two different occasions, the Respondent discharged Manso in reprisal for such conduct. The Respondent asserts that the first series of incidents, which were the subject of a grievance and arbitration proceeding, should not be relitigated in a Board proceeding and that the Board should defer to the award of the arbitration panel. It further asserts that the Respondent took the actions it did respecting six casual dockworkers because it was obligated to do so by the terms of its collective-bargaining agreement, not because of any desire to punish them for asserting their contractual rights. Respondent denies that its supervisors threatened any employees and asserts that Manso was discharged for violating company rules regarding tardiness and making oneself available to respond to work calls. On these contentions the issues were joined.[3]

[1] The principal docket entries in this case are as follows: Charge filed by Michael Manso and Andy Trujillo, two individuals, against the Respondent in Case 28–CA–9500 on November 21, 1988, and amended on November 28 and again on December 8, 1988; complaint issued against the Respondent in Case 28–CA–9500 by the Acting Regional Director for Region 28 on September 21, 1989; Respondent's answer was filed on November 3, 1989; charge was filed by Michael Manso, an individual, against the Respondent in Case 28–CA–9916 on September 1, 1989; complaint issued against the Respondent in Case 28–CA–9916 by the Regional Director on October 13, 1989, and consolidated with the complaint in Case 28–CA–9500 on the same day; Respondent's answer was filed on October 26, 1989; Respondent's first amended answer to both complaints filed on December 15, 1989; Respondent's second amended answer filed on January 6, 1990; hearing held in Albuquerque, New Mexico, on January 9 and 10, 1990; Briefs filed me by the General Counsel and the Respondent on or before February 12, 1990. The Respondent also filed a reply brief in this case. There is no provision under the Board's Rules and Regulations for the filing of a reply brief with an administrative law judge. Accordingly, that brief will be stricken and its contents will be disregarded.

[2] Respondent admits, and I find, that it is a Delaware corporation. It is engaged in the interstate transportation of freight and maintains a terminal for that purpose at Albuquerque, New Mexico. During the preceding 12-month period, the Respondent, in the course and conduct the aforesaid business, derived gross revenues from the transportation mmodities from the State of New Mexico directly to points and places located outside the State of New Mexico valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript are noted and corrected.

FINDINGS OF FACT

The Unfair Labor Practices Alleged

Respondent operates a large motor freight business throughout the United States and, through membership in a multiemployer association, is a party to the Teamsters National Motor Freight Agreement. Included in its operation are about 150 truck terminals in the western United States. Through membership in a regional multiemployer association, the Respondent is also a party to the Western States Area Agreement, which contains a supplemental agreement covering local cartage and dockworkers. One of the Respondent's large western facilities is a break bulk terminal at Albuquerque, New Mexico, where it employs approximately 100 dockworkers. They are engaged not only in loading and unloading freight originating in or destined for Albuquerque but also in breaking down and reshipping freight passing through that area destined for other locations.

Most of the Respondent's Albuquerque dockworkers are on its regular seniority list and are entitled to select shifts based on their date of permanent hire.[4] Because its daily demand for dockworker employees fluctuates, some 15 percent of those on the regular dockworker seniority list are employed on an on-call basis. While they are assured of a 40-hour workweek, the so-called ''fifteen percenters'' do not work fixed shifts and must remain available for calls as needed. They are guaranteed a break of at least 16 hours between shifts and need not remain available for call after working 40 hours in any given week.

In addition, the Respondent employs casual dockworker employees, who are employed from time to time on 8-hour shifts and who must make themselves available for assignment in much the same manner as a regular ''fifteen percenter.'' However, a casual has no standing under the contract as an employee and is not guaranteed any particular amount of employment. He may work 40 hours one week and 8 hours or no hours the next week. The Respondent may discontinue a casual employee by the simple stratagem of not calling him to work. While there may be some inconsistency in the record, it appears that regular casual employees have no standing under the grievance and arbitration machinery[5] and have different health benefit costs because they may not work the full 40 hours in a month necessary to entitle an employee to health benefits. At least at one time, regular casuals did not receive premium pay for holiday work. Respondent employs casuals in any significant numbers only at its Albuquerque and Los Angeles terminals.

As a result of this practice, the Respondent's terminal at Albuquerque enjoyed a hiring arrangement under which it could tailor its work force to the ebb and flow of daily traffic

[4] The Respondent operates its Albuquerque facility on a 24-hour, 7-day week basis, and has five overlapping 8-hour shifts, which begin at midnight, 5 a.m., 8:30 a.m., 3:30 p.m., and 5 p.m.

[5] Respondent's witnesses testified that regular casuals have no contractual right to file grievances. There is certainly nothing in the contract which clearly confers such a right on regular casuals, as distinguished from preferential casuals. In the arbitration award, which is at issue in this case, the Respondent interposed an objection at the first stage of the grievance procedure that the casuals who were the subject of the grievance had no standing to complain. Notwithstanding this objection, the grievants did obtain substantial relief in the final award. In this proceeding, where it served the Respondent's purpose to admit that regular casuals have standing to complain under the grievance procedure, the Respondent took two opposite positions on this point in the course of a 5-minute colloquy.

without incurring any permanent responsibility to a large group of needed employees. Since regular casuals did not, and still do not, enjoy seniority, the Respondent could call some of these individuals to work at random while ignoring others; it had no obligation whatsoever to hire any casual if and when vacancies occurred among its cadre of regular dockworkers, regardless of how long the casual might have worked for the Respondent. If a likely prospect for a dockworker job appeared at the employment office, he could be hired for a permanent position in preference to a casual employee who might have been on call and on the payroll for years. The presence of a large number of experienced casuals to supplement its regular complement of employees meant that the Respondent had available a possible source of qualified replacements in the event of a strike.

The 1988 Western States Area Agreement put a substantial crimp in this practice. The local cartage and dockworker supplement to this agreement introduced a new concept, namely that of a preferred casual, who was given a standing not previously accorded to anyone who was not on the regular seniority list. Article 60, section 4, of the 1988 contract provides:

> (e) Any casual or non-seniority owner-driver used by the Employer for seventy (70) eight (8) hour shifts within six (6) consecutive months, shall be automatically processed by the Employer to determine whether the casual meets the Employer's hiring standards and qualifications. Such processing shall be completed within thirty (30) calendar days of the last day of the seventieth [70th] shift.
>
> Automatic processing may be waived with a written agreement between the individual, the Local Union, and the Employer. After such processing, if the casual employee meets the Employer's hiring standards and qualifications for regular employment, he/she shall be placed on a preferential hiring list for future regular employment and shall be selected for regular employment in the order in which he/she was placed on the preferential hiring list and he/she shall not be subject to any probationary period. His/her seniority date will be the date he/she is put on the seniority list. Failure of the employer to add casuals from the preferential hiring list in this order shall subject the Employer to a runaround claim.
>
> Casual employees who are placed on the preferential hiring list and who meet the Employer's hiring standards and qualifications for regular employment shall have regular monthly health and welfare contributions paid by the Employer on their behalf as set forth in Article 52, Section 1, Health and Welfare, the month following the month such casual first becomes eligible for regular employment. Such contributions shall continue to be paid by the Employer each month thereafter provided the preferential casual satisfies the forty (40) hour eligibility requirement provided in Article 52. Preferential casuals who qualify for regular health and welfare contributions shall also be eligible for regular health and welfare benefits each month a regular contribution is paid by the Employer on their behalf.
>
> If the casual employee does not meet the Employer's hiring standards and qualifications or refuses to accept regular employment while on the preferential hiring list, the casual and the Local Union shall be so notified in writing and his/her use as a casual will be discontinued.
>
> Casual employees on the preferential hiring list shall be offered available extra work in seniority order by classification, as among themselves. The Employer shall not be obligated to make more than one (1) call per casual per day and such call need not be verified. However, abuse of this procedure will be subject to the grievance procedure. Further, casuals on the preferential hiring list shall have access to the grievance procedure in the event of disciplinary action.
>
> When an Employer utilizes eight (8) hour supplemental casuals thirty (30) or more days in any two (2) consecutive calendar months, the Employer shall add one (1) regular employee from the preferential hiring list.

Hence, under the new procedure, the Respondent could no longer use the services of a casual on an indefinite basis. After 70 shifts, a casual had to be placed on the preferential list and, whenever vacancies arose in the regular list, preferential casuals had the right, if qualified, to be hired on a permanent basis. The Respondent was no longer able to hire directly off the street in preference to hiring a long-time casual employee and, to prevent evasion of the meaning and intent of the new provision, a formula was devised to determine when vacancies might exist on the regular dockworker roster which the employer was obligated to fill from the preferential list. To back up the standing of an aspiring dockworker, preferential casuals were given explicit standing to invoke the grievance and arbitration machinery of the contract if subjected to company discipline.

In the spring of 1988, the National Master Freight Agreement between the Teamsters International and, inter alia, the Respondent in this case was ratified.[6] Around April 1, 1988, Union Business Agent Gus Trujillo and Union Secretary-Treasurer Ralph Chavez met with Albuquerque Terminal Manager Mike Long, Respondent Regional Vice President Sid Hatfield, and Albuquerque Operations Manager Robert Herrington to discuss the question of preferential casuals which had been inserted in the new Western States Area Agreement. The Union took the position that everyone who had completed 70 shifts as a casual employee should be automatically put on the preferential casual list. The Respondent objected, claiming that many of the casual dockworkers were not qualified to be regular dockworkers because they were not also qualified as city drivers. The Union argued that, in the past, the Respondent had permitted casual dockworkers to learn how to drive by operating company trucks on their own time in the terminal yard. Hatfield said that this would be unacceptable and that casuals would not be allowed to obtain driver experience while on the preferential list. The only time the Company would train a casual was when an opening arose on its list of regular dockworkers. He insisted that any casuals who refused to sign waivers of their right to be placed on the preferential list after working 70 shifts would be fired. I credit Trujillo's tes-

[6] Actually, 63 percent of the national membership of the Teamsters voted to reject the contract. However, since the constitution of the International requires a two-thirds vote to reject a contract which has been submitted for ratification, the contract in question was deemed approved.

timony that he would not agree to the discharge of any casual employees and to his further statement that he would file a grievance if any casuals were discharged because they refused to sign waivers.

On May 20, 1988, Western Motor Carriers, Inc., the employer association which bargains for the Respondent and other carriers with respect to matters pertaining particularly to western motor carriers, sent its members a letter instructing them that the settlement was retroactive to April 1, 1988, with respect to monetary items and would take effect on May 29, 1988, with respect to nonmonetary items, which included the new provisions relating to preferential casual employees at issue in this case. It also informed member employers that they had 30 days, dating from May 29, in which to process casual employees eligible for preferential listing. The letter stated:

> If you do not terminate such casuals prior to the end of the 30-day period from May 29, 1988, such casuals will be placed on the appropriate preferential hiring list and will be considered eligible for future hire as regulars as well as for call for available daily casual work.

Thereafter, the Respondent reviewed the personnel records at its Albuquerque terminal and determined that 12 individuals had met the 70-shift requirement for preferential treatment. It also determined that none of them were driver-qualified, although this determination was later revised as to one dockworker. Respondent likes to be in a position to utilize dockworkers from time to time to make local pickups and deliveries and to act as hostlers, i.e., to drive vehicles about in the terminal yard. For this reason, it has required regular employees to be what it calls driver-qualified, namely to possess a class 8 New Mexico driver's license, to pass U.S. Department of Transportation health and driver's examinations, and to have 2 years of experience in operating a tractor-trailer rig—the so-called 18-wheeler. Passing a course in driving tractor-trailer rigs is regarded as the equivalent of 2 years' experience, and, when vacancies have arisen on its regular seniority list, the Respondent has often sent candidates for regular employment to school at company expense so they can be given qualifying training. While the Respondent's testimony would give one to believe that the driver qualification requirement has been an inflexible prerequisite for regular employment, the record reflects that the Respondent waived this requirement when it purchased two companies, Navajo and East Texas, and absorbed their dockworkers into its own work force.

On June 20, 1988, Respondent gave to all casual dockworkers whom it deemed unqualified for regular employment the following letter:

> In accordance with Article 60, Section 4(e) of the Western States Area Pickup and Delivery, Local Cartage and Dockworker Supplemental Agreement, this is to advise you that you do not meet ABF's hiring standards and qualifications for regular employment. Therefore, your name cannot be added to a preferential hiring list as referred to in the aforementioned Article and your use as a casual is being discontinued effective immediately.

The letter was signed by Mike Long.

In addition to this written communication, Robert Herrington had several conversations with the dockworkers who were being discharged. Herrington told Michael Manso when he handed him his discharge letter that Manso was being laid off because the Company was not going to have a preferential casual list. Manso asked Herrington what he was talking about so Herrington started explaining the provisions of the new article of the contract pertaining to preferential casuals. Manso then asked Herrington if anything could be done about it, to which Herrington replied, ''Not at this time.'' Herrington went on to repeat that the Company was not going to have a preferential list and the Union was not going to tell them whom it might hire. He went on to explain to Manso that under the preferential casual provision of the contract casuals would have to be hired in accordance with their standing on the preferential list and the Company simply would not have such a list.

Herrington also informed casual dockworker Jerry Miera that he would be fired. His statement to Miera was that the latter was being fired ''given the situation.'' When Miera asked why, Herrington replied that Miera had worked 70 shifts during the preceding 6 months and had been processed but did not meet the Company's qualifications. Herrington then suggested that, if Miera wished to look further into the matter, he should call his union representative and possibly have that part of the contract changed so casuals could get their jobs back. Herrington also told Miera he was sorry to have to fire him because Miera had been one of the Company's better casuals.[7]

After receiving a letter from the Company informing him that he had been discharged, casual dockworker Albert Miranda phoned Herrington. Miranda had been working about 32 to 40 hours a week so he asked Herrington why the Company was taking this action. Herrington replied that the Respondent did not have a preferential hiring list. Miranda then asked Herrington why he had not been permitted to sign a waiver but Herrington gave no answer. Casual dockworker Chad Sullins was told personally by Herrington that the Company was firing him because he did not meet the Company's qualifications. At that time Sullins had been working 5 or 6 days each week. Casual dockworkers Arnold Haynes and Tim Connolly were present so Herrington directed his remarks to them as well. In his testimony concerning this event, Haynes added that Herrington told these employees that they did not meet company standards, meaning that they did not know how to drive a tractor-trailer. Haynes objected, saying that he thought that the Company was going to send casuals to driving school.[8] Herrington said he was not going to take all twelve casuals who were eligible under the contract for preferential status and send them to driving school because he did not need 12 drivers. He said that he did not want to have a preferred list and wanted to keep on working under the old arrangement. He added that he would prefer to keep on hiring people for regular slots in the way the Company had been doing rather than as the contract provided. He also told the employees present at this conversa-

[7] During the weeks preceding his discharge, Manso had been working a full 40-hour week while Miera had been working overtime.

[8] Herrington had told Haynes when he was first hired that when the Company was ready to hire a casual as a full-time driver it would send him to driving school.

tion that it was the Union's fault that they were being discharged, insisting that he really did not want to fire them because they had been good employees but the contract required him to do so and he had to comply with its provisions.

Later, after a grievance had been filed concerning the discharge of casual dockworkers, Herrington phoned Sullins and offered him an opportunity to sign a waiver of his right to be placed on the preferential list. Sullins declined. Herrington told Sullins that he did not like the idea of a preferential list because it would force him to put people from that list on the regular list. He expressed the opinion that the ''end-of-the-break'' terminals might benefit from such an arrangement because they did not have many casuals, but he did not want to put anyone on the preferential list who was not driver-qualified.

On June 21, 1988, the Union filed a grievance on behalf of all 12 casual dockworkers whom the Respondent discharged. The ultimate award arising out of this grievance disposed of the discharges of the six employees named in the complaints in this case. The other discharges were settled by the parties during the pendency of the arbitration case. On June 29, 1988, the Arizona-New Mexico Joint State Committee heard the grievance at the first step in Albuquerque. According to the standard nationwide Teamster grievance procedure, the first two steps consist of hearings before panels of individuals composed of an equal number of employers and union representatives, none of whom are parties to the immediate dispute. If the first-step panel cannot resolve the grievance by majority vote, the deadlocked case is forwarded to the second step which, in this case, was the Joint Western Area Committee, composed of four employer and four union representatives. If this body deadlocks, and it did, the matter is finally referred to the National Grievance Committee in Washington, composed of the International president of the Teamsters and the chairman of the national employer bargaining committee. In the event of a deadlock at this level, or if either party is dissatisfied with the national award, either party may resort to self help.

The first step of the grievance was heard at the Howard Johnson Motel in Albuquerque. Hatfield and Herrington spoke with a number of grievants outside the hearing room to discuss the matter at issue. Hatfield was asked why ABF was not going to have a preferential casual list. He replied that the Company did not want one, did not need one, and would hire whom it wanted when it wanted. Herrington told the grievants who were present that they could have their jobs back immediately if they signed a waiver. Eventually five grievants—Steve Carlson, Jim Olson, Andy Turrietta, Tim Connelly, and Rick Tingley—signed waivers and returned to work. The Respondent reviewed the record of Charles Estrada a second time, determined that he was qualified as a driver, and placed him on its regular dockworker list. After the conclusion of the first-step hearing, Herrington phoned Manso, Sullins, Haynes, and Trujillo and offered to let each of them come back to work if they would sign a waiver. They all declined to do so.

Sometime after the first-step grievance committee deadlocked, Hatfield again spoke with Trujillo about resolving the grievance. Hatfield proposed that all casuals who had worked the qualifying hours set forth in the contract be placed on a preferential list but that the Respondent be under no obligation to offer them driver training until an opening arose on the regular dockworker list. Trujillo insisted that the Company provide driver training to all casuals on the preferred list, a proposal which the Respondent felt would be too costly.

The second-step grievance committee, which met in San Francisco, also deadlocked, thereby forwarding the case to the National Grievance Committee in Washington. In a letter, dated April 6, 1989, the Union and Employer members of the National Grievance Committee resolved the dispute as follows:

> Please be advised that the National Grievance Committee, on April 6, 1989, adopted a motion that, based on the transcript, this case shall be resolved in the following manner:
>
> 1. Grievants Carlson, Olson, and Estrada are removed from the grievance inasmuch as their grievances were previously resolved in a manner that is consistent with the decision in this case.
>
> 2. Waivers previously executed by several of the employees are null and void.
>
> 3. The grievants, excluding the aforementioned three (3), shall be placed on the preferential hire list in the order they completed their seventieth (70th) shift.
>
> 4. As regular positions become available, the grievants will be offered regular employment from the preferential hire list and shall not be subject to the thirty (30) day processing period.
>
> 5. Driver-qualified grievants will be immediately placed in openings as they become available. Nonqualified drivers will be offered training in ABF's driver training course as their respective openings occur. Appropriate travel and lodging expenses will be paid if training is held outside Albuquerque and they shall be compensated in accordance with ABF's regular training program.
>
> 6. If the grievant satisfactorily completes training, he shall be immediately added to the seniority list. If he refuses training or fails the course, his services shall be terminated and not used again.
>
> 7. There shall be no money claims paid as a result of this decision.

Of the five casuals who had executed waivers and who had continued to work during the pendency of the grievance, two had been sent to drivers' school and one had been placed on the regular dockworker seniority list. Immediately following the decision of the National Grievance Committee, the Respondent wrote letters to the six grievants who had not signed waivers and offered to reemploy them. The letters read:

> Pursuant to the National Grievance Committee decision in Case #N-4-89-W4, you are being placed on the preferential hiring list in the order in which you completed your 70th shift within six (6) consecutive months.
>
> Effective Monday, April 24, 1989, you will be subject to call for casual work from the preferential hiring list, in the order that your name appears on the list.

As regular positions become available, you will be offered regular employment from the preferential hiring list under the following conditions:

(A) You shall not be subject to the thirty (30) day processing period.

(B) If you are driver-qualified, you will be immediately placed on the regular seniority roster as openings become available.

(C) If you are not driver-qualified, you will be offered training in ABF's Driver Training Course as respective openings occur. Appropriate travel and lodging expenses will be paid to you if the training course is held outside Albuquerque, and you shall be compensated in accordance with ABF's regular training program.

(D) If you satisfactorily complete driver training, you will be immediately added to the regular seniority roster. If you refuse training, or fail the training course, your services will be terminated.

Discriminatees Haynes, Manso, Sullins, and Trujillo returned to work. The others apparently did not, although there is evidence in the record that Miranda was on the payroll subsequent to the national decision and was removed thereafter for an attendance-related infraction.

I credit Manso's testimony that on his return to the dock he was greeted with menacing statements from three supervisors. Operations Supervisor (foreman) Chris Lovato told Manso that he had better watch his step because ABF was gunning for him. Manso replied that he would do so. Operations Supervisor Thomas C. McNutt assured Manso that he had nothing to do with Manso's discharge. He mentioned that he noticed that Manso had been coming to work with a ''pissed-off'' attitude and suggested that Manso should try to work with a good attitude and things would go a lot easier. McNutt also told Manso to be careful because higher management was after him. Operations Supervisor Kyle Beeson told Manso, ''Well, you made it back. Let's see how long it takes them to get rid of you this time.''

On setting up the preferential casual list, the Respondent began to implement a practice known as verification. When a foreman needed a casual dockworker to work on the following shift, he would summon a rank-and-file Teamsters member to place the call. If the preferential casual being called did not answer the phone, the teamster was then asked to sign a written verification that a call had been placed and that no response was forthcoming, whereupon disciplinary action could be taken for failing to ''protect one's shift.'' A second instance of failing to respond to a call authorized the Company to remove an employee from the preferential casual list and to discharge him.

On May 8, less than a month after his return to work, Manso was given a warning letter for failing to protect his shift, i.e., failing to be available for a call to work, which was placed on May 6. On June 19, he received a letter discharging him for again failing to protect his shift, i.e., not being home to receive a call at 5:51 a.m. on that date. The call was verified by a regular dockworker employee, Jeff Motter. Manso grieved the discharge and was reinstated at the first step of the grievance procedure but without pay. At the hearing in this case, Jeff Motter credibly testified that between 5 and 6 a.m. on June 19, Supervisor Ronald S. Ford asked him to verify phone calls that were being made to summon casuals to work for the following shift, which was scheduled to begin at 8:30 a.m. Motter said that he was quite tired and thought that he had misdialed Manso's number. When no one answered the call, Motter told Ford that he thought that he might have dialed the wrong number and asked permission to dial it again. Ford would not let him do so and insisted that Motter sign the call verification form. Motter became very angry and told Ford that he did not want to verify any more phone calls placed to casuals.

On August 11, Manso was given a warning letter for coming to work 4 minutes late on the 5 a.m. shift. On August 17, Manso was again late to work on the 5 a.m. shift. On this occasion, he did not arrive until almost 6 a.m. According to Manso, he was driving to work along I-40 when his car overheated, so he had to pull over and park by the side of the highway. He found a phone booth near an abandoned filling station and phoned the terminal. There is no dispute that he phoned in about 5:25 a.m. to say he had trouble. Then, according to Manso, he phoned his wife, who drove quickly to the site of the phone booth in her car to pick him up. Manso then drove her car back onto I-40 and headed for the terminal with her, whereupon he was pulled over by Bernalillo County deputy sheriff Derryl Smith for speeding. Officer Smith issued only a warning and permitted Manso to proceed on his way.

When Manso arrived at work, he was closely questioned by supervisors concerning his story. When asked what time he left home, he became evasive and insisted that the answer to that question was irrelevant. The plant manager then drove to the spot on I-40 where Manso said he had parked his overheated vehicle and could find nothing. The Company pursued its investigation of this event by questioning Officer Smith and getting a statement from him. Based on its investigation, the Respondent concluded that Manso was falsifying the reason for his tardiness so it discharged him for coming to work late on two different occasions. Manso grieved this discharge but lost at the first-step hearing and did not pursue his grievance any further. In testimony before the Board, Officer Smith did not corroborate Manso's story, testifying that when he pulled Manso over on I-40 to issue a warning for excessive speed there was no one with Manso in his vehicle.

Analysis and Conclusions

The establishment of a preferential casual list for dockworkers by article 60 of the 1988 Western States Area Agreement threatened to bring about a small revolution in the hiring practices at the Respondent's Albuquerque terminal. Before this time, the Respondent was able to keep down its costs and to assure maximum flexibility and minimum liability in its dock operation by supplementing its regular complement of employees with a pool of extra workers who could be hired and fired at will and who, if they wanted to remain on the Respondent's list, and to forgo other employment opportunities and make themselves available for call without any obligation on the part of the Respondent to call them. Now the contract made casual employment on the dock a recognized first step on a career ladder and laid out well-defined points along the way at which the Respondent must accord improved status to any dockworker who continues to make himself available for hire.

Respondent's witnesses to the contrary notwithstanding, it enjoyed the best of all possible worlds with the regular cas-

ual system and it was loath to abandon it. I flatly discredit the self-serving testimony of Hatfield, Herrington, Fultz, Johnson, and possibly others that the Respondent applauded the institution of the preferential casual system in the 1988 contract and regarded it as a boon to its operation. If the Respondent had regarded preferential listing of casual dockworkers as enthusiastically as its testimony would have the Board believe, the Respondent could have unilaterally instituted this system without seeking the approval of anyone many years ago and enjoyed the many benefits it says the system now has brought about. However, Respondent did nothing of the sort until it was forced to do so, not merely by contract but also by a National Grievance Committee award forcing it to comply with the plain language of that contract. Even so, and at this late date some 2 years following the adoption of article 60, not one casual dockworker at the Albuquerque terminal has made it from the preferential list to the regular dockworker seniority list, despite the fact that at least three regular dockworkers in a work force of 100 have resigned or retired during that same period. Respondent has been fighting a last ditch effort to avoid the implementation of the preferential list requirement of article 60 of the Western States contract at its Albuquerque terminal and the positions taken by it in this case are simply a part of that effort.

Herrington explained to several casuals at the time of their termination in June or 1988 what the Company's feeling was concerning preferential listing and why it felt the way it did. I credit testimony that he said that the Respondent much preferred to keep on operating its dock the way it had been doing—using a list of regular seniority employees supplemented by a group of extras who had no standing under the contract even to file a grievance in the event of being shortchanged or otherwise mistreated. Herrington was quite emphatic in his opposition to preferential listing of casuals: the Company was not going to let the Union tell it whom it was going to hire and when it was going to hire anyone. When the Respondent was forced to implement the provisions of article 60, it was willing to discharge several experienced dockworkers—men who admittedly had been doing a good job and who were working full workweeks in casual status—rather than forego its traditional way of manning the facility. The only alternatives presented to all casuals were to waive their contractual rights or be discharged. This was told to them a second time by Herrington and Hatfield a few days later, just before the Arizona-New Mexico Joint States Grievance Committee began to hear their case at the first step. Some casuals accepted the Respondent's terms, signed waivers, and were put back to work. Six did not and were out of work for nearly a year until the National Grievance Committee directed the Respondent to put them back to work.

Even at that point, the Respondent did not relinquish its effort to avoid the full impact of article 60. Without bothering to notify the Union or to bargain with it, the Respondent instituted toward preferential casuals a practice or policy that was at a variance with, and more stringent than, the practice it had been following with respect to other dockworkers. So-called ''fifteen percenters'' were and are called twice, and only on the second call is any effort made to verify the call for purpose of imposing discipline for not protecting one's shift. If there are enough casuals available, a 15-percenter can pass a call. Regular casuals are not called in any stated order and no effort is ever made to verify calls placed to them. However, preferential casuals are called only once and those calls are verified so that discipline may easily ensue if no one answers the phone.

In the matter of lateness, the record is full of instances in which the Respondent either overlooked tardiness on the part of regular dockworkers or accorded it minimal importance while applying a more stringent standard of punctuality to preferential casuals. Indeed, in the Respondent's effort to show lack of disparate treatment to Manso, the instances of similar stringent treatment for attendance-related infractions upon which it relied on were limited to conduct on the part of other preferential casuals. Respondent admits that its attendance standards are more lenient for other classes of employees. When asked why the difference, the Respondent conceded that, in terms of the functioning of the dock operation, a preferential casual who comes late to work poses no bigger problem that a regular who is late. The best the Respondent could devise as an explanation for such differential treatment was that preferential casuals were a new category or classification of dockworker and this was simply how they decided to handle them. The lack of any credible explanation based on business necessity for disparity of treatment of a whole class demonstrates that, even now, the Respondent is attempting to harass preferential casuals so that it will be easier to discharge them before they become regular seniority employees, and to persuade regular casuals that they are better off by waiving their right to be processed for preferential status and remaining in regular casual status.

In pursuing its effort to avoid complying with article 60 of the Western States Area contract, the Respondent resorted to several fanciful arguments based on its contract with the Union, thus laying the blame for actions it assertedly did not wish to take on provisions of an agreement by which it was bound and upon the Union which wanted to hold it to the provisions of that contract. According to the Respondent, the implementation of article 60 meant that it would have to place unqualified preferentials on their regular dockworker seniority list each time a vacancy occurred. There is nothing in the contract which even remotely suggests such a possibility. The contract states in pertinent part:

> If the casual employee does not meet the Employer's hiring standards and qualifications . . . *while on the preferential hiring* list, the casual and the Local Union shall be so notified in writing and his/her use will be discontinued. [Emphasis added.]

It is abundantly clear that a determination of qualifications for permanent retention should, under the contract, be made while the casual is on the preferential list, not before he is placed there. The award made by National Grievance Committee applied the contract in just that manner and this is how the parties are now required to apply it. To say that moving a dockworker from the regular casual list to the preferred list automatically entitles him by contract to a place on the regular list, regardless of qualifications, in the event of an opening is so wholly bereft of substance that it is not even arguable.

After the first-step grievance committee became deadlocked, the Respondent advanced a fall-back position. It offered to place casuals on a preferential list if the Union

would agree that it had no obligation to train them until an opening should occur on the regular seniority list. The Union wanted all dockworkers trained to operate tractor-trailers whenever they were placed on the preferential list. The contract is silent on this precise point. The practice requested by the Respondent was enjoined upon the parties by the National Grievance Committee award. However, the Respondent was free to implement this practice immediately under the terms of the contract, with or without union consent. Its proffered excuse for refusing to do so, namely that it feared that the Union would file a grievance if it went ahead unilaterally and did what it had offered to do, is frivolous. The Union had already filed a grievance that involved this question and the award arising out of that grievance resolved it.

Respondent's reason for not training all dockworkers as soon as they are placed on the preferred list also lacks substance and business justification. According to the Respondent, it costs about $1,500 to give a dockworker driver training. The Respondent voiced the fear that, if all preferential dockworkers were given this training, they might quit and go to work for other companies. The same possibility exists with respect to any qualified regular dockworker, most of whom are driver qualified. Moreover, a cadre of driver-trained preferential dockworkers would mean that both they and regular dockworkers would be available for whatever occasional driving chores might arise, rather than leaving these functions exclusively to the regulars.[9] Here again, the Respondent was raising pretextual excuses for not creating a preferential list of dockworkers by attempting to use the contract as a basis for doing what it really did not want to do under any circumstances.

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court gave its approval to the Board's *Interboro* doctrine[10] which, in general terms, states that it is a Section 7 right for an employee to assert rights conferred on him and his fellow employees through a collective-bargaining agreement. In pertinent part, the Court stated:

> Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also the entire process envisioned by Congress as the means by which to achieve industrial peace.
>
> To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of Section 7. [Citations omitted.]
>
> Indeed, it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.
>
> . . . .
>
> No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. [Supra at 835, 836, 840, 841.]

The protected concerted activity of the six discriminatees named in the complaints in this case does not consist of overt actions, such as complaining to a union official about safety violations and the failure of an employer to pay employees the contract rate for their services, or the refusal of an employee to drive an unsafe vehicle. Rather, their concerted protected activity was a refusal to sign waivers of their contract rights and the insistence, implicit in such a refusal, that those contract rights be accorded to them. Herrington told all of the casual dockworkers on or about June 20, 1988, that they were being discharged because they had not signed waivers of their contract right to be processed for inclusion on the preferential list. His statements violated Section 8(a)(1) of the Act. As the direct and immediate result of their refusal to execute contract waivers, the dockworkers were discharged. Such discharges violate Section 8(a)(3) of the Act. *Pennsylvania Electric Co*., 289 NLRB 1200 (1988). Respondent's subsequent refusal to reinstate any casuals until they did sign contract waivers is a followup violation of Section 8(a)(3) of the Act. The defense proffered for such discharges was, as outlined above, pretextual. The contract in question did not even arguably provide the Respondent with any warrant for doing what it did, and the grievance award, which was issued following those discharges, simply emphasized that fact.

The statements made to Manso upon his return to work by Supervisors McNutt, Lovato, and Beeson amounted to threats that the Respondent would seek further retaliation against Manso because he had filed a grievance and also because he had filed an unfair labor practice charge.[11] Such threats violate Section 8(a)(1) of the Act.

The complaint in Case 28–CA–9916 alleges that the Respondent unlawfully discharged Manso on June 19, 1989, because he filed a charge under the Act and because he filed a grievance. As noted, supra, the filing of a grievance is a

[9] Herrington told several casuals just before they were discharged that he was not going to the expense of training 12 dockworkers to drive tractor-trailers because he did not need so many drivers. If true, his statement meant that the Respondent was advancing, as a justification for its position under the contract, a requirement for driver qualification of dockworkers when it really did not need drivers at all.

[10] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[11] The Respondent has advanced the argument that it should not be charged with any unlawful activity in the summer of 1989 arising out of the action of Manso and Trujillo in filing an unfair labor practice charge against the Respondent on November 21, 1988. It is the Respondent's position that its lower ranking supervisors in Albuquerque were unaware that the charge had been filed and so could not be motivated in their actions by the fact that the charge had been docketed. The record reflects that the original charge in Case 28–CA–9500, as well as an amended charge filed a few days later, were served on the Respondent during November 1988, at its Albuquerque terminal. Accordingly, the Respondent and all of its agents are deemed to have knowledge that the unfair labor practice charge and the amendment thereto were in fact filed by Manso and Trujillo.

Section 7 right; the filing of an unfair labor practice charge is protected by Section 8(a)(4) of the Act. Manso was a party not only to a grievance that had been filed against the Respondent, but he was a party to a successful grievance that forced the Respondent to comply with a provision of the contract with which it was extremely reluctant to abide.[12] On his return to work, Manso was told that the Respondent was laying for him. Within 6 weeks, he was discharged.

The event that triggered the discharge was his asserted failure to respond to a call to work made at the request of Supervisor Ronald Ford by Teamster Jeff Motter. The call in question was made pursuant to a verification procedure that, as noted above, applied solely to preferential casuals, was more stringent than the call procedure used for other nonshift employees, and a procedure for which the Respondent could advance no business justification. In making the call, Motter was afraid that he had misdialed Manso's phone number, told Ford about the suspected error, and asked to dial again. Ford refused his request and directed Motter to sign a verification form attesting to the fact that Motter had dialed Manso's phone number and that there had been no reply. The Respondent could not justify the discharge that followed from this event to the Arizona-New Mexico Joint State Committee so Manso was reinstated without pay.

It is apparent from these facts that the Respondent harbored animus against Manso for engaging in protected activities and that there was no solid factual basis for its conclusion that Manso did not respond to a call to work on June 19. When Motter noted a suspected dialing error, the Respondent could have easily clarified the question by permitting Motter to dial again. It did not do so, thus evidencing a motive directed not toward filling out its complement of employees for the morning shift but of arming itself with a justification for discharging an unwanted employee. When it discharged Manso on June 19, the Respondent violated Section 8(a)(1), (3), and (4) of the Act.

On August 17, Manso was admittedly late to work. His reason for tardiness was that his car had overheated on the interstate highway and he had to seek other means of transportation. Fultz admitted in his testimony that if the Respondent had believed this story Manso would not have been discharged. However, it suspected that Manso had really overslept and was falsifying an excuse, so it discharged him because it felt that there had been an element of dishonesty in Manso's entire course of conduct in this matter. I am compelled to agree with the Respondent. Manso said that he had parked his overheated vehicle along the side of the road at a stated location on I-40. The plant manager went out to search for the vehicle at this point shortly after Manson made this statement. He found nothing. Manso told the Respondent and testified at the hearing that he had been picked up by his wife in another vehicle and was driving to work when he was stopped for speeding by a deputy sheriff. The officer in question failed to corroborate an essential detail of Manso's story. In testifying in this proceeding, officer Smith stated categorically that there was no one in the car with Manso when he stopped to give Manso a warning for excessive speed. Smith was a credible and neutral witness, and I have no reason not to accept his testimony at face value. Accordingly, I must conclude that Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble. In light of this conclusion, I must further find that the Respondent discharged Michael Manso on August 17 for cause and that so much of the complaints which allege that he was discharged on that date in reprisal for protected concerted activities and for filing a charge under the Act must be dismissed.

The Respondent asserts that the Board should defer to the grievance procedure in the contract respecting the issue of the 1988 grievance addressing the discharge of dockworkers for refusing to sign contractual waivers. It recognizes that deferral has been deemed by the Board to be inappropriate for discharges or other disciplinary action alleged to have been taken in violation of Section 8(a)(4) of the Act,[13] so it concedes that a determination on the merits should be made concerning the 1989 disciplinary actions taken against Manso. Respondent's request for deferral to the first grievance determination must necessarily be directed to the final award of April 6, 1989, since the intermediate actions of the Joint State and Western Area boards in that case were deadlocks which did not decide anything and did not result in an award. *Rosicrucian Press, Ltd*., 264 NLRB 1323 (1982).

The National Grievance Committee did not purport to hear or decide an unfair labor practice case. In fact it paid only perfunctory attention to the contract in question. Its resolution of the dispute between Local 492 and ABF amounted to knocking heads together and issuing directives to two contentious parties. While this may be an effective and common sense way of achieving industrial peace, it does not constitute an arbitral award which meets the standards for deferral.

It should be observed that, in the usual case in which deferral is in question, a disappointed grievant has gone to arbitration, has been turned down, and later seeks from the Board the relief he was denied under the grievance machinery by alleging the existence of an unfair labor practice. In such instances, the Board may be called on to construe a contract in a manner inconsistent with the contract interpretation rendered by an arbitrator whose principal function is to interpret the meaning of disputed contract clauses. In this instance, the result reached by the National Grievance Committee is consistent with, and indeed supports, the finding of an unfair labor practice, since its award negated the validity of the Respondent's defense to the unfair labor practice allegations in the complaints, namely that the contract required the Respondent to discharge all unqualified casuals who had refused to execute waivers. The only aspect of the grievance resolution which was inconsistent with normal Board practice was the failure of the committee to award backpay to the grievants.

The April 6, 1989 award by the National Grievance Committee made no findings of fact or conclusions of law. It

[12] The Respondent maintained throughout this proceeding that it actually won the grievance that was filed against it relating to the creation of a list of preferential casuals. Any party to litigation is entitled to put whatever spin it wishes on the outcome of a proceeding. However, the National Grievance Committee nullified the waivers which the Respondent insisted upon exacting from casual dockworkers as the price of their continued employment and ordered that six dockworkers who had refused to execute such waivers be reinstated. This is not the stuff of which notable victories are made.

[13] See, for example, *Filmation Associates*, 227 NLRB 1721 (1977); *International Harvester Co*., 271 NLRB 647 (1984); *Art Steel of California*, 256 NLRB 816 (1981); with respect to deferring to grievance machinery for charges involving harassment for filing a grievance, see *Postal Service*, 290 NLRB 120 (1988).

dealt exclusively with results. It made no mention of the elements of the unfair labor practice issues which were litigated in this proceeding nor did the testimony presented to the Western Area Committee on which the National Committee relied address any unfair labor practice. Accordingly, the Board should not defer to the award in question. *American Freight Systems*, 264 NLRB 126 (1982); *Cotter & Co*., 276 NLRB 714 (1985) ; *Ryder/P. I. E. Nationwide*, 278 NLRB 713 (1986); *M & G Convoy*, 287 NLRB 1140 (1988); *Dick Gidron Cadillac*, 287 NLRB 1107 (1988).[14]

On these findings of fact and conclusions of law and on the entire record, I make the following

CONCLUSIONS OF LAW

1. ABF Freight System, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and its Local 492, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Michael Manso, Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins because they insisted that the Respondent comply with the provisions of a collective-bargaining agreement governing the terms and conditions of their employment, by refusing to reinstate these employees for the same reason, and by discharging Michael Manso because he filed a grievance against the Respondent, the Respondent violated Section 8(a)(3) of the Act.

4. By discharging Michael Manso because he filed charges under the Act, the Respondent violated Section 8(a)(4) of the Act.

5. By the acts and conduct set forth above in Conclusions of Law 3 and 4, by threatening employees with discharge because they filed charges under the Act, and because they have filed grievances under the provisions of a collective-bargaining agreement; and by threatening employees with discharge because they have insisted on the observance of rights guaranteed to them by contract, the Respondent violated Section 8(a)(1) of the Act.

6. The above unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. The recommended Order will state that Respondent be required to offer full and immediate reinstatement to Andy Trujillo, Jerry Miera, Arnold Haynes, Al Miranda, and Chad Sullins, and that it make them and Michael Manso whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[15] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The fact that the National Grievance Committee failed to award backpay for the contract violation which it impliedly found had been committed by the Respondent is immaterial to a remedy which is appropriate in this case. As the General Counsel pointed out in his brief, backpay orders as remedies for violations of the Act have been a part of Board practice since its inception and there is no reason to depart from that practice in this case. To refrain from doing so because the National Grievance Committee refrained from doing so would be to defer to a portion of that award, an action which would be inappropriate for reasons already stated. See *Consolidated Freightways*, 290 NLRB 771 (1988), I shall also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

[14] The Respondent also argues that somehow the charges filed in this case were time-barred by Sec. 10(b) of the Act. The original charge was filed on November 21, 1988. The discharges litigated in the complaint arising out of the refusal of certain dockworkers to execute waivers of their contractual rights took place on or about June 20, 1988. The charge was filed well within the 6-month period allowed by the Act.

[15] *F. W. Woolworth Co*., 90 NLRB 289 (1950) .